Statement of

The Honorable Patrick Leahy

United States Senator
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Ranking Member, Judiciary Committee

Executive Business Meeting

Wednesday, September 13, 2006

Earlier this week, the Committee held an important hearing on the Department of Justice's policy to coerce waivers of the attorney-client privilege in various settings. Erosion of the right to counsel undermines the fairness of our criminal justice system for all Americans. Once lost, this fundamental right would be hard to regain. Many critics worry that the so-called "Thompson Memorandum" and the Justice Department's current practices are yet another example of this Administration's tendency to overreach in asserting Executive power without regard for the Constitution, the laws, and basic fairness. A growing number of critics of the Thompson Memorandum - including former Reagan Attorney General Edwin Meese, the U.S. Chamber of Commerce, the American Bar Association and the editorial board of The Wall Street Journal- have expressed concern that the Department's policy is too heavy handed, coercive and intimating.

This Administration has taken extraordinary steps to investigate and prosecute the press and to intimidate the media, critics, and attorneys while it has claimed unlimited privileges and unprecedented secrecy for itself. The Chairman and I have worked together this week in our latest effort at oversight. It is in that same spirit that I wish we could take effective action and engage in effective oversight of the unauthorized warrantless wiretapping program that the Administration operated in secret for most of the last five years.

I have been attempting to clarify the facts and the law relating to the Administration's warrantless wiretapping program since it was first disclosed in December 2005. During the ensuing eight months, we have made numerous efforts to get straight answers from the Administration regarding the nature, scope and purported legal basis of this program. Our efforts were rebuffed

by the most flagrant and disrespectful stonewalling of any Administration that I have seen in my 32 years in Congress.

While refusing to answer even our most basic questions about its secret spying program and its purported legal justification, the Administration claimed that Congress approved the program when it authorized the use of military force in Afghanistan--although Attorney General Gonzales had to admit that this was an "evolving" rationale not present at the time Congress considered its action. The Administration claimed that even if they violated the Foreign Intelligence Surveillance Act (FISA), the President's powers and their view of the "unitary executive" must trump the law and the authority of Congress. Not since the rationalization of Richard Nixon for actions during the White House horrors and Watergate scandal have we heard such a claim. And, of course, the Administration claimed it had all the authority it needed and no new legislation was needed.

Turning to the bill before us that the Chairman negotiated with the White House, in my view it contains several fundamental flaws:

The bill makes compliance with FISA entirely optional, and explicitly validates the President's claim that he has unfettered authority to wiretap Americans in the name of national security. In other words, it suggests that FISA is unconstitutional - a claim for which there is no judicial precedent and very little academic support - and invites the President to ignore it.

The bill abandons the traditional, case-by-case review contemplated by FISA and introduces the concept of "program warrants." If that novel concept is constitutional - which I doubt -- a single FISA court judge could approve whole programs of electronic surveillance that go far beyond the President's program.

The bill immunizes from prosecution anyone who breaks into a home or office in the United States to search for foreign intelligence information, if he is acting at the behest of the President. I would have thought that electronic surveillance is a large enough area to address in one bill. But apparently, the Administration was unwilling to address electronic surveillance without also reaching for new powers to break into Americans' homes.

And, the 16 pages of fundamental revisions to FISA contained in Section 9 create gaping loopholes in FISA's current court order requirement by redefining key terms and making other changes.

I was disappointed during the Committee's debate last week to witness Republican members close their minds on these matters. It appears that no amount of debate will make any difference and that no amendments will garner a single Republican vote.

I do not read the language of the bill the Chairman negotiated with the White House the way that he does.

I suppose you could say that the bill removes constraints on Executive powers rather than creating entirely new powers, but that is semantics. The end result is the same; this bill is all about authorizing the President to invade the homes, e-mails and telephone conversations of American citizens in ways that are expressly forbidden by law.

So far, federal judges in Oregon, California, and Michigan have rejected the Government's state secrets claim, and in the Oregon case, there appears little doubt about the plaintiffs' standing since they have documentary proof that they were monitored under the program. Senator Schumer has offered an alternative and more limited measure to ensure standing. Of course, the President and the Department of Justice could allow the challenges to go forward on the merits by choosing not to raise technical legal issues or assert the state secret doctrine as a blunderbuss.

If the Government's state secrets and standing arguments present real obstacles to judicial review, the bill would do nothing to remove those obstacles. To the contrary, the bill expressly preserves all Government litigation privileges.

As for the bill's provisions authorizing the Administration to apply for program warrants, it may sound like a good way to obtain judicial review -- until you think about it. The program warrant concept itself is novel and constitutionally suspect. It may well be non-justiciable, since it involves asking a federal judge to go beyond an individual case or controversy and instead make a broad policy decision about a whole category of Government activity. In essence, it asks an individual judge to legislate in broad terms the scope of Government surveillance power. And Section 9 of the bill would redefine electronic surveillance so narrowly that the Government might not need - and the FISA court might not have jurisdiction to issue -- any warrant for the sort of surveillance that the Administration has admitted to conducting.

The Chairman said that he would like to see the issue of inherent authority resolved by the Supreme Court. But under the bill, there is almost no chance it would reach the Supreme Court. Under the bill, if the FISA court approves a government application for a program warrant -- after a secret and one-sided proceeding in which the Government is the only party -- then there is

no appeal. If the FISA court refuses to approve an application, the Government has a range of options. It could appeal, but it would more likely take advantage of the fact that the bill allows the Government to submit second and successive applications to various individual FISA court judges. Or, the Government could skip the whole process and proceed without court approval and outside of FISA, which the bill makes optional. Under those scenarios, the Supreme Court would have no opportunity to resolve the constitutional issue.

As the Supreme Court recently explained in its Hamdan decision, "Whether or not the President has independent power, absent congressional authorization ... he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." Thus, even assuming that the President had some undefined inherent power to carry out national security searches without a warrant, Congress may place limitations on that power, and those limitations are binding. They are the law. No one is above the law, not even the President.

The Chairman has said that President Bush would not agree to legislation that required submission of his domestic surveillance program to the FISA court - which is what the original version of the Chairman's bill proposed - because he did not want to bind future Presidents. But even taking this purported concern at face value, the bill's solution is using a sledgehammer to crack a nut. If the concern is with future Presidents, and the Administration means what it represented to Senator Specter that it is prepared to submit to judicial review, the solution is simple. We could restore the mandate as Chairman Specter originally drafted it, but have it expire on the day that this President leaves office. In other words, we could require this President to do what he has informally promised to do, without binding future Presidents.

The Chairman said, "what our concern ought to be is to solve the present problem, to get the current program submitted for judicial review." That is, of course, what Senator Schumer's bill aims to do, without gutting FISA, and without relying on unenforceable side agreements. If Republicans share that concern, Senator Schumer's bill is far simpler and better and should be approved unanimously by this Committee.

Senator Cornyn referred to the bill's mandatory transfer provisions as a "prohibition against judge shopping," but in fact they are just the opposite. The bill is the ultimate example of forum shopping. It would give one party - the Government - an absolute right to move every case to the FISA Court of Review, for a one-sided proceeding in which the Government is the only recognized party before judges whose members are handpicked. Contrary to what the Senator from Texas suggested, the FISA Court of Review has no unique competence in the constitutional issues concerning the President's inherent powers and the impact of FISA on those powers. In its

history, the FISA Court of Review has issued only a single decision. The U.S. District Court for the Southern District of New York, which sits just a few blocks from Ground Zero, has far more experience with terrorism cases than the FISA Court of Review, and many Federal judges at the district court and appellate levels have significant expertise on constitutional issues.

There was a claim last week that the inherent authority provision in Section 8 of the bill is weaker than what is in FISA today, quoting a portion of FISA known as the "embassy exception." That is, at best, an apples to oranges comparison. The current embassy exception is strictly limited to circumstances in which "there is no substantial likelihood that the surveillance will acquire the contents of any communications to which a United States person is a party." Moreover, that narrow exception is one that Congress elected to make. Section 8, by contrast, appears to exempt the President from the requirements of FISA regardless of whether he is listening in on the calls of American citizens, and it would ground that exemption from accountability in an unsound interpretation of the Constitution rather than the policy judgments of Congress.

Let me turn now to the rhetorical claims made by the bill's defenders about matters of procedure. At the end of last week's markup, my colleagues and I were accused of obstruction. I will confess that I am in no rush to rubberstamp a flawed bill that would expand Governmental power and reduce Governmental accountability in an area in which we have been unable to engage in effective oversight.

But we all know who is really engaged in obstruction here. It is the Bush-Cheney Administration that has evaded judicial review for five years by refusing to seek warrants, in violation of FISA. It is the Bush-Cheney Administration that has refused to answer the questions of this Committee and of the Intelligence Committee. It is the Bush-Cheney Administration that continues to advance specious arguments regarding the 2001 Authorization for the Use of Military Force resolution. It is the Bush-Cheney Administration that four years ago rebuffed Senator DeWine when he proposed amending FISA to make it easier to obtain warrants. No wonder, then, that earlier this year, it was the Bush-Cheney Administration that Chairman Specter and Chairman Sensenbrenner rightly accused of "stonewalling" on these matters.

At our last meeting, Senator Cornyn said that Congress and the President need to work together as "partners." I agree. That is what we have done on multiple occasions since the 1970s, when FISA was first enacted. We worked as partners in October 2001 to craft the amendments to FISA contained in the USA PATRIOT Act. Of course, over the last five years, instead of working with us as partners this Administration has carried on its secret spy-on-Americans-without-warrants program. Moreover, partners do not attempt to rewrite history in order to pass the buck for failures that occur on their watch. I remain stunned by section 2 of the bill, which purports to find

that the FBI did not seek a warrant to search Moussaoui's laptop computer because it could not meet FISA's requirements. That finding is flatly contrary to the facts as determined not only by the Leahy-Specter-Grassley Report, but also by the Final Report of the Joint Inquiry of the House and Senate Intelligence Committee. Both reports found that the FBI failed to seek a warrant because key personnel misunderstood the applicable legal standard. We have come to expect little from an Administration that often says one thing while knowing another, but the attempt to enshrine false and revisionist history into law is truly a low point.

Let's be real. The Bush-Cheney Administration is not looking for a partner. Partners don't hide their activities from each other for five years. Partners don't refuse well-intentioned offers of help, like Senator DeWine's offer in 2002, or mine on military commissions in 2002, in order to keep on hiding the facts from each other. Partners don't insist, as a precondition of any deal, that they have unfettered power. And partners don't refuse to talk with each other for five years and then suddenly attack the other's patriotism for asking questions and not immediately acquiescing to one-sided demands. The Bush-Cheney Administration is not looking for a partner, it is looking for a way to avoid accountability and a rubberstamp Congress.

This Committee has two important functions, an oversight function and a legislative function. Having backed off of hearings because questioning Administration witnesses would be "futile," to use the Chairman's term, we have effectively abdicated our oversight function The majority now proposes that we abdicate our legislative function as well, by reporting out multiple bills with fundamentally differing approaches to issues that we lack sufficient information to address intelligently. I do not understand, and I do not believe the American people will understand, how Committee members can support more than one of the incompatible bills currently before this Committee. Either FISA is mandatory or it is optional; either the President has inherent power to ignore whatever Congress legislates regarding domestic surveillance of Americans or he does not. This Committee will have failed the American people if it votes out bills that have it both ways on these basic issues.

We all believe that monitoring the communications of suspected terrorists is essential. And, especially when the monitoring involves Americans, it needs to be done lawfully and with adequate checks and balances to prevent abuses of Americans' rights and Americans' privacy. The need for safeguards is more than a hypothetical exercise. Concern about earlier abuses is one of the reasons we have FISA in the first place. Now we are being asked to make sweeping and fundamental changes in the law for reasons that we do not know and in order to legalize secret, unlawful actions that the Bush-Cheney Administration refuses to fully divulge. We do not know what we need to know to assess the proposals before us and to legislate responsibly.

We can do better. If legislation is really needed to affirm the availability of judicial review, then let's write that legislation together with no strings attached. If FISA needs fixing, then let's work from a bipartisan bill that has been crafted by a Senator who has at least had access to the limited

information provided by the Administration to the Intelligence Committee. The only such bill available is the Feinstein-Specter bill. Alternatively, we can accuse each other of obstruction while the Administration continues to thumb its nose at the Congress and the courts.

I continue to hope that we can work together to legislate good policy, based on a careful review of the merits, rather than watch the majority attempt to ram through a partisan back-room deal that rubber-stamps the Administration's unlawful domestic spying activities and bogus constitutional assertions.

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